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**COMMENTS OF ACA INTERNATIONAL ON
FCC'S NOTICE OF PROPOSED RULEMAKING IN
CG DOCKET NO. 04-53**

PROPOSED FCC REGULATIONS IMPLEMENTING CAN-SPAM ACT

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INTRODUCTION

The following comments are submitted on behalf of ACA International (“ACA”) in response to the request by the Federal Communications Commission (“FCC” or “Commission”) for comments on the Notice of Proposed Rulemaking in CG Docket 04-53. *See* 69 Fed. Reg. 16873 (March 31, 2004) (“NPRM”). The FCC seeks comment on “how to best carry out our mandate from Congress [under the CAN-SPAM Act] to protect consumers and businesses from the costs, inefficiencies, and inconveniences that result from unwanted messages sent to their wireless devices.”

ACA submits these comments request that the Commission expressly clarify that messages sent to wireless devices for the primary purpose of collecting debts are not “mobile service commercial message[s]” (“MSCM”) under the CAN-SPAM Act.¹ Messages initiated for the purpose of collecting debts, at most, are “transactional or relationship message[s].” As such, these communications are exempt from the Act’s coverage. Moreover, such communications are already subject to extensive regulation by the Federal Trade Commission as “communication[s]”² under the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692a(2). In order to avoid a mistaken belief by debtors that the CAN-SPAM Act and the FCC’s regulation prohibit the collection of

¹ As the FCC states in the NPRM, “only *commercial* electronic messages transmitted directly to a wireless device used by a CMRS subscriber would fall within the definition of MSCMs under the Act.” FCC 04-52 at 7 (emphasis added). The FCC further states that, under the Act, the determination of whether an electronic message is “commercial” is based on its “primary purpose.” *Id.* In addition, the FCC recognizes that “transactional or relationship messages” are not “commercial” messages within the meaning of the Act. *Id.*

² The FDCPA defines a “communication” broadly to include “the conveying of information regarding a debt directly or indirectly to any person through any medium.” 15 U.S.C. § 1692a(2).

debts by electronic means, ACA respectfully requests that the FCC's proposed rule should expressly clarify that messages sent to wireless devices for the purpose of collecting debts are not MSCM or otherwise subject to the statute and regulation.

I. Statement on ACA

ACA International is an international trade organization of credit and collection professionals who provide a wide variety of accounts receivable management services. Headquartered in Minneapolis, Minnesota, ACA represents approximately 5,300 third party collection agencies, attorneys, credit grantors, and vendor affiliates. Members comply with all applicable federal and state laws and regulations regarding debt collection, as well as ethical standards and guidelines established by ACA. Specifically, the collection activity of ACA members is regulated by the Federal Trade Commission under the FDCPA, the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, and other federal and state laws.

II. ACA Members Play a Vital Role in Safeguarding a Healthy Economy

There is no question that uncollected consumer debt threatens America's economy. According to the Federal Reserve Board and United States Census Bureau, total consumer bad debt costs every adult in the United States \$683 every year. This translates into a cost for the average non-supervisory worker of nearly 54 hours (before taxes) in annual salary that pays for the bad debt of other consumers. Outstanding credit card debt has doubled in the past decade and now approaches three quarters of a trillion dollars. Eileen Alt Powell, *Consumer Debt More Than Doubles in a Decade*, Associated Press, Jan. 6, 2004. Total consumer debt, including home mortgages, exceeds \$9 trillion. William Branigan, *U.S. Consumer Debt Grows at an Alarming Rate*. Wash. Post, Jan. 12,

2004. Moreover, the greatest increases in consumer debt are traced to consumers with the least amount of disposable income to repay their obligations. For example, between 1989 and 2001, American families with annual incomes of less than \$10,000 experienced a 184% increase in their average debt.

Uncollected debt harms consumers. This fact is reflected in the continued increase in consumer bankruptcies. In 2003, there were more than 1.63 million personal bankruptcies filed, representing a 5.6% increase from 2002 levels. Even further, the harmful consequences of uncollected debt are not limited to consumers. It also impacts the smallest of businesses in addition to the largest of the credit grantors.

ACA members are an extension of every community's business. We represent the local hardware store, the retailer down the street, and the doctor. The collection industry works with these businesses, large and small, to obtain payment for the goods and services received by consumers. Without collection, the economic viability of these businesses, and by extension, the American economy in general, faces a grave threat. At the very least, Americans are forced to pay higher prices to compensate for uncollected debt.

As the above demonstrates, the ability of ACA members to initiate collection using electronic communications is critical to the health of our economy. Each year ACA members engage in hundreds of millions of attempts to contact consumers by telephone. In addition, it is becoming increasingly prevalent to communicate with debtors by electronic mail or other wireless means. The primary purpose of these communications is to collect debts owed by consumers to creditors. In years past, the combined effort of ACA members have resulted in the recovery of billions of dollars annually that are

returned to business and reinvested. For example, ACA members recovered and returned over \$30 billion in 1999 alone, a massive infusion of money into the national economy.

ACA urges the FCC to recognize the pivotal role played by the debt collection industry, and to ensure that its regulations implementing the CAN-SPAM Act do not inadvertently obstruct lawful debt collection contacts – a possible result of the current state of manifold, conflicting regulatory mandates.

III. Specific Comments on the NPRM

In enacting the CAN-SPAM Act, Congress sought to address the problem of unsolicited e-mail, or “spam,” and vested the FCC and several other federal agencies, including the Federal Trade Commission, with rulemaking authority to implement the statute. Pursuant to section 14 of the Act, the FCC now seeks comment on proposed rules implementing the Act. In particular, the FCC seeks comment on how to enable consumers to avoid unwanted MSCMs.

1. Debt Collection Communications Not Spam.

Electronic communications sent to or received by debtors for the purpose of collecting debts, when made to wireless devices, are clearly not unsolicited MSCMs that Congress sought to restrict. Instead, such communications are, at most, “transactional or relationship messages” which Congress explicitly exempted from the Act’s coverage. *See* CAN-SPAM Act § 3(2)(B) (“The term ‘commercial electronic mail message’ does not include a transactional or relationship message”).

The CAN-SPAM Act defines the MSCMs as a “commercial electronic mail message that is transmitted directly to a wireless device that is utilized by a subscriber of commercial mobile service.” In turn, “commercial electronic mail message” as “any

electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose).” CAN-SPAM Act § 3(2)(A). The Act further directs the FCC to issue regulations defining the relevant criteria for determining an e-mail’s “primary purpose.” CAN-SPAM Act § 3(2)(C). The NPRM makes it clear that its proposed rule governing MSCMs would apply only to communications that are “commercial,” as determined by the communication’s primary purpose. *See* FCC 04-52 at 7.

It should be obvious that a debt collection communication sent to a wireless device does not have as its primary purpose the advertisement or promotion of a commercial product or service. Collection agencies send e-mails and other forms of communication to debtors – whether by mail, wireline, or wireless communications – for the purpose of collecting preexisting debts owed either to the sender or, as is more often the case, a third-party creditor. These communications do not advertise or promote products or services. It merely seeks to recover money owed for a product, service, or loan that has already been provided but has not been fully paid off by the debtor.

Although there is an ancillary component of the call to arrange for payment of the debt by options such as cash, electronic check or Western Union, these payment options are commercial advertisement or promotion of a commercial product or service, nor are they the “primary purpose” of the communication . Indeed, the FCC reached a similar conclusion that debt collection calls are not commercial advertisements in the context of the Telephone Consumer Protection Act. *See* 1995 TCPA Reconsideration Order, 10 FCC Rcd at 12397-401, para. 17 (“We have specifically noted that ‘prerecorded debt

collection calls [are] exempt from the prohibitions on [[prerecorded] calls to residences as . . . commercial calls . . . which do not transmit an unsolicited advertisement”).

The FCC should clarify that communications initiated for the purpose to collect a debt are exempt from the CAN-SPAM Act and, therefore, are not covered by the proposed rule. The proposed clarification would be consistent with the Federal Trade Commission’s previous determination that debt collection calls do not constitute “telemarketing.” *FTC Telemarketing Sales Rule*, 68 Fed. Reg. 4580, 4664 n.1020. The FTC is the primary federal agency regulating the credit and collection industry. Consequently, ACA respectfully requests that the FCC’s rule acknowledge that debt collection communications to wireless devices are not covered by the CAN-SPAM Act because they are not “commercial” MSCMs within the meaning of the Act.

2. Debt Collection Communications, at Most, are Transactional or Relationship Messages.

Congress explicitly exempted “transactional or relationship messages” from the CAN-SPAM Act. The Act defines such messages to include electronic communications the primary purpose of which is “to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender;” CAN-SPAM Act § 3(17)(A)(i), or “to provide - . . . account balance information or other type of account statement with respect to [an] account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender.” CAN-SPAM Act § 3(17)(iii)(III). Debt collection communications fall squarely within the type of conduct Congress identified as exempt from the CAN-SPAM Act, that is, collection calls facilitate, complete, or confirm a transactions initiated by a consumer.

Absent a regulatory exempt, *see supra* Part III.1., ACA urges the Commission to make clear in its rulemaking that debt collection communications sent to wireless devices are, at most, “transactional or relationship messages” within the meaning of the CAN-SPAM Act, and therefore not subject to the proposed rule. The language of section 3(17) would seemingly make this clear, except for the fact that a debt collector (the “sender” of the message) might not be considered the party with whom the recipient entered into a debtor-creditor relationship.

There is nothing in the Act, however, suggesting that Congress intended to create a loophole in the definition of “transactional or relationship messages” through which debtors could escape collection attempts. A debt collection agency operates as an agent of the creditor. In the Act’s terminology, collection agencies are paid to “complete . . . a commercial transaction that the recipient has previously agreed to enter into The Commission should make this point plain in the present rulemaking. Otherwise, debtors could abuse the CAN-SPAM Act by seeking to block legitimate and perfectly legal debt collection communications simply by porting all incoming communications to or through a wireless device. This is a loophole that Congress clearly did not intend.

3. The FCC Should Exercise its Rulemaking Authority to Exempt from the CAN-SPAM Act and Implementing Regulations all “Communications” as Defined by the FDCPA

Debt collection agencies are already subject to numerous regulatory requirements under the strict liability provisions of the FDCPA. The FDCPA is unique in the sense that it was enacted by Congress more than twenty years ago to regulate only one industry – debt collectors. The FDCPA regulates the practices of debt collectors in locating debtors, 15 U.S.C. § 1692b, in restricting how and how often debtors may be contacted,

15 U.S.C. § 1692c, in preventing harassment or abuse, 15 U.S.C. § 1692d, or false or misleading representations, 15 U.S.C. § 1692(e). The FDCPA imposes stiff penalties, *see* 15 U.S.C. § 1692k, and confers robust administrative enforcement powers. *See* 15 U.S.C. § 1692l. It also affords consumers a private right of action. Indeed, the FDCPA gives consumers the right to cease communications with debt collectors altogether. *See* 15 U.S.C. § 1692c(c). In short, the FDCPA already establishes a welter of finely-tuned behavioral restrictions on the debt collection industry, and it fully protects debtors from abusive communications via wireless communications or any other means.

The CAN-SPAM Act, by contrast, contains nothing that would suggest that Congress intended to classify debt collection communications as spam. In light of this fact, another option available to the Commission is to exempt debt-collection communications from the CAN-SPAM regulation by excluding “communication[s]” under the FDCPA. The statutory definition of “communication” under the FDCPA would clearly apply to debt collection communications sent to wireless devices. As noted previously, the term is defined broadly to include “conveying of information regarding a debt directly or indirectly to any person through any medium.” 15 U.S.C. § 1692a(2).

CONCLUSION

Debt-collection communications are not spam. ACA asks the Commission to recognize and reaffirm this simple fact in its rulemaking. Ultimately, it would be counterproductive to enable debtors to block necessary, albeit unwanted, communications seeking collection on debts. Allowing debtors to evade debt collection communications would do nothing to correct the spam problem and would do much to harm the nation’s economic well-being.